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I hereby certify that this paper (along with any paper referred to as being attached or enclosed) is being deposited with the United States Postal Services on the date shown below with sufficient postage as first class mail in an envelope addressed to Office of Petitions, Commissioner for Patents, Washington DC 20231

Judy L. Brown

(Type or print name of person mailing paper)

Date: 10/2/02

Judy L Brown

(Signature of person mailing paper)

## PATENT IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicants: G. Mockry et al.

Atty Docket No. 530.005PA

Ser. No. 09/878,860

October 2, 2002

Filed May 10, 2002 (petitioned for date June 9, 2001)

Art Unit: 3711

For: "Baseball Quick"(as amended)

Examiner:

### **PETITION TO RECONSIDER REFUSAL TO GRANT FILING DATE**

Office of Petitions  
Hon. Commissioner for Patents  
Washington, DC 20231

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**OCT 09 2002**

Sir:

**OFFICE OF PETITIONS**

Applicants hereby petition the Commissioner to reconsider the refusal to grant them the filing date of June 9, 2001, which is the date that a complete application, together with fees and signed declaration, was present at the United States Patent and Trademark Office. The prior petition was filed May 10, 2002, and the Decision on Petition dismissing the Petition was mailed from the Office of Petitions on August 14, 2002.

The supporting Declaration of Mr. George Mockry that accompanied the earlier petition is incorporated herein by reference.

Applicants are now also enclosing a Certified Copy of their original Provisional Application 60/211,208, and a copy of the first page of the filing receipt for the present application, which had been mailed out on December 20, 2001, to the joint applicant Mr. George 10/08/2002 AWONDAF1 00000027 09878860

Mockry. Applicants also enclose a copy of the Notice of Incomplete Nonprovisional Application which was mailed March 15, 2002.

Applicants are enclosing as petition fee a payment of \$130, but specifically request that this amount be refunded, by way of credit to the Deposit Account of the undersigned attorney, to wit, Deposit Account 50-1771. Any additional fees associated with this Petition may be charged, or any overpayment credited to our deposit account 50-1771.

The Decision on Petition concluded that the written description (pages 1 and 2 of the specification) was not present in the USPTO on the June 9, 2001, filing date, and that Petitioner has failed to satisfactorily demonstrate that a written description of the invention was present in the Office on June 9, 2001.

As basis for this the Decision states that the best evidence of what was filed on June 9, 2001, is applicant's postcard receipt, which does note "4 original copies of provisional" although it does not state "written description", "specification" or "2 pages". In support of this, the Decision cites MPEP §503, to wit:

[t]he postcard receipt will not serve as prima facie evidence of receipt of any item which is not adequately itemized on the postcard. For example, merely listing on the postcard 'a complete application' or 'patent application' will not serve as a proper receipt for each of the required components of an application (e.g., specification (including claims), drawings (if necessary), oath or declaration and the application filing fee [ ] or missing portions (e.g., pages, sheets of drawings) of an application if one of the components or portions of a component is found to be missing by the USPTO. Each separate component should be specifically and properly itemized on the postcard.

The "best evidence" status of the applicant's return postcard does not preclude the Applicant from presenting of supplemental or secondary evidence, and does not preclude its being considered. The best evidence rule has a basis for application in the patent field, but the rule is not "hard and fast" and secondary evidence is admissible, as long as it is relevant.

Commissioner v. Deutsche Gold-und-Silber-Scheideanstalt Vormas Roessler, 157 USPQ 549, 563 (D. DC 1968); In re Widmer, 147 USPQ 518, 524-5 (CCPA 1965).

To begin with, the passage immediately following the quotation above in MPEP §503 clearly instructs the Office of Initial Patent Examination as follows:

The person receiving the item(s) in the PTO will check the listing on the postcard against the item(s) being filed to be sure they are properly identified and that all the items listed on the postcard are presently being submitted to the PTO. If any of the items listed on the postcard are not being submitted to the PTO, those items will be crossed off and the postcard initialed by the person receiving the items.

Here, nothing listed on the return post card was crossed out, and the item identified as “provisional” or “4 original copies of provisional” presumably *was actually present*. That only leaves the question of what is meant by “provisional”. In the common parlance of the United States Patent and Trademark Office community, this means only one thing, namely, a provisional patent application filed under 35 USC 111(b) and in accordance with 37 CFR §1.53(c). There is no serious question that the item that was listed on the postcard, and not crossed out, is the Applicant’s provisional patent application, and in this case, Provisional Application Ser. No. 60/211,208, and which is referenced in the Declaration papers which claim priority under 35 USC 1.19(e).

In addition, MPEP §506 imposes an affirmative duty on the OIPE to give the applicant notice of any defects in the filing of a non-provisional application, and to issue a PTO-1123, Notice of Incomplete Application. In particular, this part of the MPEP states:

If the nonprovisional application papers filed under 37 CFR 1.53(b) do not include at least a specification containing a description and at least one claim and a drawing, if necessary under 35 U.S.C. 113 (first sentence) or if the submitted application papers are too informal to be given a filing date, the case is held in the

Office of Initial Patent Examination (OIPE) as an incomplete application and the applicant is informed of the shortcomings of the papers. No filing date is granted until the incompleteness is corrected.

Form PTO-1123, Notice of Incomplete Application, is prepared and mailed by the OIPE when nonprovisional application papers filed under 37 CFR 1.53(b) are deemed incomplete under 35 U.S.C. 111(a).

In this application, the Office issued a filing receipt (of which a copy of the first page is enclosed), which was mailed out December 20, 2001, indicating that the application had been accorded the filing date of June 9, 2001, and had been assigned to Group Art Unit 3711. The Filing Receipt also stated that the foreign filing license had been granted as of December 20, 2001 and gave a projected publication date of March 28, 2002. The Notice of Incomplete Nonprovisional Application did not precede or accompany the filing receipt, and in fact it is apparent that the complete application left the OIPE to go to its next destination. It was only after the application reached the Publications Branch (for the projected publication) that the specification was discovered to be missing. Only then did the PTO issue a Notice of Incomplete Nonprovisional Application, which was mailed out on March 15, 2002. This was the earliest that Applicants were notified of this defect. Since the OIPE is under an affirmative duty to inspect the incoming files for completeness, and are presumed to be competent to carry out this duty, it has to be presumed that the application was complete when filed and up until December 20, 2001, and that the specification went missing sometime between that date and March 15, 2002.

Applicant's undersigned attorney also notes that it is the practice of the Office to notify an applicant *immediately* of any missing parts, and invariably the Notice of Missing Parts or Notice of Incomplete Nonprovisional Application either precedes or accompanies any official filing receipt. There is no reason to believe that the customary practice was disregarded in this case. Instead, without any explanation of the part of the Office, the presumption is that there was no need for such a notice because the written description was not missing then, but was present

in the application file when it was being inspected by the OIPE.

The granting of a foreign filing license on the filing receipt is a clear indication that the screening process required for all applications under MPEP §115 actually took place, and that the disclosure, to wit, the written description, was present and was actually reviewed for this purpose.

Applicants also point out that the Provisional that was filed (as the written description portion of the specification), and which was identified on the Applicant's post card, is identical with the text of their Provisional Application Ser. No. 60/211,208, of which a Certified Copy of the USPTO file is enclosed. This provisional application was present at the Patent and Trademark Office as of the filing date of June 9, 2001, and indeed had been present there since June 13, 2000. There is no new matter incorporated in the text thereof that was submitted May 10, 2002.

In summary, the early indications from the Office, i.e., by way of the return post card and the official filing receipt, were that all the required parts that the Applicants believed they submitted were actually received at the Office. The part in question, namely, the copy of the provisional application that serves as the two pages of written description, was present on June 9, 2001, and went missing after it had been received.

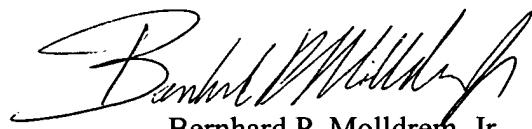
In addition, it is error to assert that the allegedly missing written description was not present in the Office on June 9, 2001, since the very paper referred to, namely Prov. Appln. Ser. No. 60/211,208, was and is still present at the USPTO. This Provisional Application is also the very document that is referenced in the Sec. 119(e) priority claim in the Declaration papers filed on June 9, 2001.

Applicant George Mockry's verification (in his Supporting Declaration filed with the earlier petition) concerning the "4 copies of original provisional" as listed on the post card, stands as acceptable, credible, and relevant evidence of what the document consisted of when he mailed it, and certainly does not contradict what is stated on the postcard. Mr. Mockry's statements are not precluded by the "best evidence" rule. There is absolutely nothing to contradict his statement that the specification, i.e., written description of the invention, in the

form of a complete copy of the provisional application Ser. No. 60/211,208, was a part of the application package that he mailed to the USPTO.

All the evidence is on the side of the written description of this application actually having been present in the USPTO on June 9, 2001. No new matter is included in the papers filed on May 10, 2002. Thus, Applicants again respectfully urge that this application is entitled to the filing date of June 9, 2001.

Respectfully submitted,



Bernhard P. Molldrem, Jr.  
Reg. No. 28,973

Attorney for Applicants  
333 East Onondaga Street  
Syracuse, NY 13203  
tel: (315) 422-4323  
fax: (315) 422-4318

Attachments:

- Certified Copy of Prov. App. Ser. No. 60/211,208
- Copy of Official Filing Receipt of December 20, 2001.
- Copy of Notice of Incomplete Nonprovisional Application of March 15, 2002.

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## UNITED STATES PATENT AND TRADEMARK OFFICE

COMMISSIONER FOR PATENTS  
 UNITED STATES PATENT AND TRADEMARK OFFICE  
 WASHINGTON, D.C. 20231  
 www.uspto.gov

| APPLICATION NUMBER | FILING DATE | GRP ART UNIT | FL FEE REC'D | ATTY.DOCKET.NO | DRAWINGS | TOT CLAIMS | IND CLAIMS |
|--------------------|-------------|--------------|--------------|----------------|----------|------------|------------|
| 09/878,860         | 06/09/2001  | 3711         | 355          |                |          | 3          | 3          |

George Mockry  
 P. O. Box 1047  
 Cortez, CO 81321



CONFIRMATION NO. 8653

## FILING RECEIPT



"OC000000007221482"

Date Mailed: 12/20/2001

Receipt is acknowledged of this nonprovisional Patent Application. It will be considered in its order and you will be notified as to the results of the examination. Be sure to provide the U.S. APPLICATION NUMBER, FILING DATE, NAME OF APPLICANT, and TITLE OF INVENTION when inquiring about this application. Fees transmitted by check or draft are subject to collection. Please verify the accuracy of the data presented on this receipt. If an error is noted on this Filing Receipt, please write to the Office of Initial Patent Examination's Customer Service Center. Please provide a copy of this Filing Receipt with the changes noted thereon. If you received a "Notice to File Missing Parts" for this application, please submit any corrections to this Filing Receipt with your reply to the Notice. When the USPTO processes the reply to the Notice, the USPTO will generate another Filing Receipt incorporating the requested corrections (if appropriate).

## Applicant(s)

Gregory Michael Mockry, Massena, NY;  
 George Michael Mockry, Cortez, CO;

## Domestic Priority data as claimed by applicant

THIS APPLN CLAIMS BENEFIT OF 60/211,208 06/13/2000

## Foreign Applications

\* If Required, Foreign Filing License Granted 12/20/2001

\* Projected Publication Date: 03/28/2002 ?

Non-Publication Request: No

Early Publication Request: No

\*\* SMALL ENTITY \*\*

Title

Baseball Quick

Preliminary Class

463

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## UNITED STATES PATENT AND TRADEMARK OFFICE

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| APPLICATION NUMBER | FILING/RECEIPT DATE | FIRST NAMED APPLICANT  | ATTORNEY DOCKET NUMBER |
|--------------------|---------------------|------------------------|------------------------|
| 09/878,860         | 06/09/2001          | Gregory Michael Mockry |                        |

George Mockry  
 P. O. Box 1047  
 Cortez, CO 81321



## CONFIRMATION NO. 8653

## FORMALITIES LETTER

OC0000000007654345

Date Mailed: 03/15/2002

## NOTICE OF INCOMPLETE NONPROVISIONAL APPLICATION

## FILED UNDER 37 CFR 1.53(b)

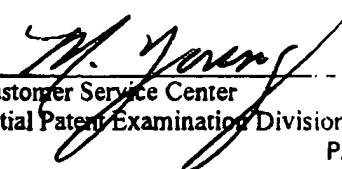
A filing date has NOT been accorded to the above-identified application papers for the reason(s) indicated below.

All of the items noted below and a newly executed oath or declaration covering the items must be submitted within **TWO MONTHS** of the date of this Notice, unless otherwise indicated, or proceedings on the application will be terminated (37 CFR 1.53(e)).

The filing date will be the date of receipt of all items required below, unless otherwise indicated. Any assertions that the item(s) required below were submitted, or are not necessary for a filing date, must be by way of petition directed to the attention of the Office of Petitions accompanied by the \$130.00 petition fee (37 CFR 1.17(h)). If the petition states that the application is entitled to a filing date, a request for a refund of the petition fee may be included in the petition.

- The specification does not include a written description of the invention.  
*A complete specification as prescribed by 35 U.S.C. 112 is required.*

*A copy of this notice MUST be returned with the reply.*

  
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Initial Patent Examination Division (703) 308-1202

PART 2 - COPY TO BE RETURNED WITH RESPONSE

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